

**UNITED STATES OF MERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

KENAI DRILLING LIMITED

and

Case 31-CA-128266

EDDIE STEWART III, an Individual

Nicole Pereira, Esq. , for the General Counsel.
Robert M. Stone, Esq. and Charles N. Hargraves, Esq.
(*Muisick, Peeler & Garrett, LLP*), of *Costa Mesa, California*,
for the Respondent.

DECISION

STATEMENT OF THE CASE

Dickie Montemayor, Administrative Law Judge. This case was tried in Los Angeles, California, on January 12, 2015. The charge in this matter was filed by Eddie Stewart, III, an individual (the Charging Party) on May 7, 2014, against Kenai Drilling Limited (the Respondent). A complaint issued on September 25, 2014. The sole issue is whether Respondent's maintenance and enforcement of an arbitration agreement and/or rule requiring employees to arbitrate their work-related complaints in an individual capacity, unless they opt-out within 30 days of receiving an employer provided opt-out notice, is unlawful under Section 8(a)(1) of the Act. This case therefore raises issues related to the Board's decisions in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. granted in part and denied in part 737 F.3d 433 (5th Cir. 2013), and *Murphy Oil*, 361 NLRB No. 72 (2014).

Respondent filed an answer denying the material allegations of the complaint and raised certain affirmative defenses, as discussed below. A hearing in this matter was held before me and the parties filed posthearing briefs. After considering the record and the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent has been a corporation with an office and place of business in Bakersfield, California. Respondent has been engaged as a drilling contractor for the oil, gas, and geothermal industries. During the 12 month period ending June 2, 2014, Respondent in conducting its operations purchased and received at its Bakersfield, California facility, goods and services valued in excess of \$50,000 directly from points outside State of California. I find

that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

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A. Stipulated Background Facts

At the hearing, the parties entered into a stipulation of facts which they identified as Joint Exhibit 1. Paragraphs 1 and 2, of the stipulation included the joint request that General Counsel Exhibits 1(a) through 1(p) and Joint Exhibits 2 through 5 be admitted into evidence without objection. Joint Exhibit 1 page 26 beginning at paragraph 3 provides as follows:

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3. (a) The charge in this proceeding was filed by the Charging Party on May 7, 2014, and a copy was served on Respondent by U.S mail on May 9, 2014.

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(b) The first amended charge in this proceeding was filed by the Charging Party on July 21, 2014, and a copy was served on Respondent by U.S. mail on July 22, 2014.

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(c) The second amended charge in this proceeding was filed by the Charging Party on August 28, 2014, and a copy was-served on Respondent by U.S. mail on September 2, 2014.

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4. (a) At all material times, Respondent has been a corporation with an office and place of business in Bakersfield, California, and has been engaged as a drilling contractor in the oil, gas, and geothermal industries.

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(b) During the 12-month period ending June 2, 2014, Respondent in conducting its operations described above in paragraph 4(a), purchased and received at its Bakersfield, California facility, goods and services valued in excess of \$50,000 directly from points outside the State of California.

5. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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6. On September 25, 2014, the Acting Regional Director of Region 31 issued a complaint and notice of hearing complaint) (GC Exh. 10)). On October 8, 2014, Respondent filed its answer to the complaint and affirmative defenses (answer) (GC Exh. 1(1)). On December 17, 2014, the Regional Director of Region 31 issued an amendment to complaint amending paragraph 4(b) of the complaint (GC Exh. 1(m)). On December 24, 2014, Respondent filed its answer to amended complaint and affirmative defenses. (GC Exh. 1(o)). The complaint and amendment to complaint allege that Respondent engaged in acts and conduct that constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act. 29 U.S.C. § 151 et seq. (the Act). Specifically, the complaint and amendment to complaint allege that Respondent interfered with,

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restrained, and coerced employees in the exercise of their Section 7 activities as set forth below:

(a) Since at least January 2007 and at all material times, Respondent has maintained an arbitration policy comprised of the binding arbitration agreement (agreement) (GC Exh. 1(j), Appendix A); the notice of binding arbitration agreement (notice) (GC Exh. 1G, Appendix B); the written acknowledgement of training (acknowledgement) (GC Exh. 10, Appendix C) and the binding arbitration program Opt-Out Notice (Opt-Out Notice) (GC Exh 1(j), Appendix D) (collectively the “arbitration Policy”). The Parties agree to the authenticity and relevancy of these documents, and their admission into evidence, without objection.

(b) At all material times, Respondent has required employees to sign a Written Acknowledgement of Training, which provides that employees would be bound to the Arbitration Policy described in the documents set forth above in paragraph 6(a), unless they opt out within 30 days of receiving the Opt-Out Notice.

7. At no time did Charging Party sign or return the opt-out notice attached to the complaint (GC Exh. 10 as Appendix D), or the opt out notice provided to him during orientation.

8. On February 19, 2014, Respondent asserted its arbitration policy described above in paragraph 6(a), in litigation brought against Respondent by Charging Party in Eddie Stewart III, individually, and on behalf of other members of the general public similarly situated, Plaintiff vs. Kenai Drilling Limited, a Delaware corporation, and DOES 1 through 10, inclusive, Defendant, Case No. BC 523209 (class action complaint) filed in Superior Court of California, County of Los Angeles (Superior Court). A copy of the class action complaint is attached as Joint Exhibit 2. Specifically:

(a) About February 19, 2014, Respondent filed a petition to compel binding arbitration, dismiss class claims, and stay action (motion to compel) and related documents including the following: Memorandum of points and authorities in support of petition to compel binding arbitration; declaration of Jennifer Phoutrides in support [of] Kenai Drilling Limited's petition for an order compelling arbitration and staying proceedings; declaration of Charles N. Hargraves in support of petition to compel binding arbitration, dismiss class claims and stay action; declaration of Kathy Shimizu in support of petition to compel binding arbitration; declaration of David A. Uhler in support of Kenai Drilling Limited's petition for an order compelling arbitration and motion to stay proceedings pending arbitration (declaration). A copy of the petition to compel and related documents are attached as Joint Exhibit 3.

(b) About March 12, 2014, Charging Party filed Plaintiff's opposition to Defendant's petition to compel arbitration, dismiss class claims, and stay action ("Opposition") and declaration of Eddie Stewart III in support of plaintiff's opposition to Defendant's petition

to compel arbitration, dismiss class claims, and stay action. A copy of Charging Party's opposition and declaration is attached as Joint Exhibit 4.

(c) About March 21, 2014, Respondent filed a reply brief in support of the petition to compel binding arbitration. Dismiss class claims and stay action (reply brief) and related documents including the following: Declaration of Jennifer Phoutrides in Support of Kenai Drilling Limited's reply brief in support of petition for an order compelling arbitration and staying proceedings; Kenai Drilling Limited's objections to declaration of Eddie Stewart submitted in support of plaintiff's opposition to Kenai Drilling Limited's petition to compel binding arbitration, dismiss class claims, and stay action; Declaration of Christine Tadd in support of Kenai Drilling Limited's reply brief in support of petition of an order compelling arbitration and staying proceedings; a copy of Respondent's reply brief and related documents is attached as Joint Exhibit 5.

(d) About May 2, 2014, the Honorable Jane Johnson, Judge of the Los Angeles County Superior Court, held a hearing and granted Respondent's petition to compel binding arbitration dismiss class claims, and stay action seeking to enforce the arbitration agreement.¹

The arbitration agreement in its entirety provided as follows:

BINDING ARBITRATION AGREEMENT

A. The following agreement sets forth the binding arbitration agreement between _____ ("Employee") and Kenai Drilling Ltd. ("Kenai") (collectively referred to as "the Parties").

B. Employee understands this binding arbitration program is OPTIONAL. However if Employee chooses not to participate in the binding arbitration program, Employee must send the Opt-Out Notice to Kenai by _____. Opt-Out Notice must be sent to David Uhler, Kenai Drilling Ltd., P.O. Box 2248, Orcutt, CA 93457 and must be received by Kenai by _____. Employee's failure to send in the Opt-Out Notice as set forth in this paragraph will be deemed acceptance of this Binding Arbitration Agreement.

TERMS OF THE BINDING ARBITRATION AGREEMENT

C. By participating in the Binding Arbitration Program, Employee and Kenai agree that any controversy, dispute or claim arising out of or relating to Employee's employment with Kenai Drilling Ltd. ("Kenai"), including the termination of employment all be settled through binding arbitration to be administered by the American Arbitration Association("AAA").

¹ At the risk of some redundancy the entire stipulation is set forth above for the sake of completeness.

D. The Parties understand that if the Employee does not opt-out as set forth above in Section B, Employee and Kenai are both giving up all rights to a trial by jury or judge relating to any dispute or controversy arising of Employee's employment with Kenai.

E. Unless otherwise specified in this Agreement, the arbitration proceedings shall be governed by AAA's Employment Arbitration Rules ("Rules").

F. Notwithstanding any provision or term set forth in the Rules, the following rules shall apply to all arbitrations conducted under this Agreement:

(1) The arbitrator shall not and does not have the authority to consolidate the claims of different Employees, entertain class actions or representative actions of any kind, or permit joinder.

(2) Summary disposition motions must be entertained by the arbitrator even through the Rules may give discretion to the Arbitrator to hear such motions if any party to this agreement seeks to bring such motion in good faith.

(3) The California Evidence Code shall apply in the arbitration proceedings and any resulting award notwithstanding any provision in the Rules. In issuing the arbitration award or in making a decision relevant to any issue in the arbitration, the arbitrator shall not rely on any evidence that is inadmissible pursuant to the California Evidence Code.

(4) Notwithstanding any provision set forth in the Rules, Employee shall be responsible for all fees and costs that he would normally be responsible for had the action been filed in state court including, but not limited to, filing fees and costs for court reporting services, etc. Each party will be responsible for his or her own attorney fees and costs, unless otherwise ordered by the arbitrator in compliance with statutory law.

(5) The arbitration hearing shall be conducted in Bakersfield, California.

(6) The Arbitrator shall not entertain any statutory claim unless the employee has satisfied any duties to exhaust administrative remedies as required by that statute examples including right to sue letters from the Department of Fair Employment and Housing and the Equal Employment Opportunity Commission. (Jt. Exh. 1).

The "Agreement" does not provide for any exceptions for types of claims filed. More specifically, there are no express exceptions for claims filed with the NLRB and/or brought under

the specific statutory framework of the NLRA. Nor is there any mention in the agreement regarding how an employee goes about actually initiating an action covered by the arbitration agreement.

5 Jenifer Phoutrides, Respondent's human resources/training coordinator, described the on-boarding process as it relates to new employees and the arbitration agreement as follows:

Q Okay. When do you do the training for the new hires?

A During their new hire enrollment training day; their very first day with Kenai.

10 Q Okay. And can you explain to us how you go about giving this training to get employees?

A I give them the packet, the acknowledgment packet, regarding arbitration along with many other new hire papers. I tell them to read the packet thoroughly and put it to the side because we'll talk about it later. And then I'll go back and then I'll ask everybody if
15 they read the packet. If I have people that say no, I make sure they read it. And then we go forth and answer questions and talk about the policies.

Q Okay. What documents are included in the packet?

A It is the acknowledgment training for arbitration and the opt-out form. That's behind it. Acknowledgment form. Yeah.

20 Q Is there also some --

A That's --

Q -- type of a notice?

A A notice to employees, yes.

Q Okay. So --

25 A The first page is the acknowledgment, then it's the notice and then it's the opt-out form.

Q And also -- is there also a copy of the agreement there as well?

A Yes.

Q Okay. So it's four documents?

30 A Yes. Sorry.

Q Okay. That's all right. So you'll ask them to read the four documents?

A Correct.

Q And once you see that they have read the documents, do you ask them any questions about them?

35 A Yeah. I generally start -- I ask them so what do they think arbitration is. People will give me their views your what they think. And then I'll start out with, you know, basically explaining what arbitration is and how to go about it or how to proceed with our procedures -- or policy.

40 With arbitration I tell them that they have 30 days to decide if they want to opt out or not. It's purely voluntary. We talk about arbitration. Let's see, I try to break it to them in a not simple form, but I tell them that, "Arbitration's another way of settling disputes that they may have with their employment with Kenai. It's purely optional. You have 30 days to decide and you're going to have many remainders in the mail about it with your paycheck stubs up until your opt-out date."

45 I make them fill their name out on the very first page of the acknowledgment and their new hire date and their opt-out date. They physically fill those dates in themselves. And then throughout the packet, it asks for them to fill in other -- or there's other areas on the

form where they fill in the opt-out dates, and I make them fill it out as well with their own writing.

Q Do you discuss the pros and cons of arbitration with them?

A I do. And I also suggest for them to look it up outside of work if it -- on their own if they don't understand it completely. Pros and cons would be -- you know, pros would be, you know -- well, pros and cons would be -- I guess class action suits are not part of it. So if you choose to be part of the arbitration program, you don't do class actions. And then it's another just way of settling disputes, like -- I don't know how to you want me to explain it or how I tell them. I don't --

Q As best you --

A Okay. I'm getting nervous. Sorry. So I'll start from the beginning. Okay, "So what is arbitration? Arbitration is another way of settling disputes with your employment" -- "about your employment with Kenai. If you go through arbitration, you don't go through normal court settings; you go in front of an arbitrator. The arbitrator's not affiliated with Kenai. It's chosen by a third-party company, AAA, Arbitrators of America and Association (sic)," I believe. "You would plead your side, Kenai pleads its side and the arbitrator makes a decision. The decision's final. You cannot appeal the verdict in arbitration like you can in normal court. So there's plenty of pros and cons that" -- "if it's important to you as a personal level, then you need to make a decision on if you want to opt out or not."

Q You mentioned class actions. Do you tell the employees about any other rights they're giving up if they don't opt out of the arbitration agreement?

A I touch on the class action suits, I touch on the verdict. You know, you can't appeal it like you can -- and that's -- that's about it.

Q Do you tell them whether they have a right to go to a jury trial?

A As part of arbitration? No. They -- they waive that.

Q Okay. And do you tell them whether they would have a right to a judge -- a trial before a judge?

A Correct. If they choose not to opt out. If they choose -- yeah, if they choose to opt out. Sorry.

Q Then they would. So if they agree -- if they don't opt out and they agree to the arbitration agreement --

A Uh-huh.

Q -- what are they giving up? What do you tell them they're giving up?

A Oh. Their rights to a judge and jury through -- they would have to use arbitration if they choose to use the program.² (Tr. 14-18).

After the training was completed, employees were required to sign a written acknowledgement of training, which advised that employees would be bound by the Arbitration Policy unless they chose to opt out within 30 days of receiving the Opt-Out Notice. (Jt. Exh. 1). Charging Party signed the acknowledgment of receipt form but did not sign and return the opt-out form within 30 days. (Jt. Exh. 1). Thereafter, as noted above, Charging Party filed a class

²It is clear from the testimony of Ms. Phourides that she is not a legal expert in the arbitration process, has only a very rudimentary understanding of arbitration in general, and would be unable to advise employees regarding the full panoply of state and federal rights and remedies a person might give up by failing to opt out of the arbitration process.

action complaint and Respondent’s efforts to enforce the arbitration were granted via a motion to compel Charging Party to individual arbitration. (Jt. Exh. 1).

III. Analysis and Conclusions

The General Counsel and the Charging Party argue that this matter is controlled by the Board’s holding in *D.R. Horton*, 357 NLRB No. 184 (2012), denied enforcement in relevant part 737 F.3d 344 (5th Cir. 2013). See also *Murphy Oil*, 361 NLRB No. 72 (2014). In those cases, the Board recognized that, “collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7 [of the National Labor Relations Act].” *D.R. Horton*, *supra*, slip op. at 3. The Board found collective redress in legal or administrative settings are “not peripheral but central to the Act’s purposes.” *Id.* The Board further found that an employer violates the Act by maintaining a prohibition on the maintenance of class or collective actions. The General Counsel asserts that, “Respondent requires employees to sign the Acknowledgement as a condition of employment. By signing the Acknowledgement, employees become bound to Respondent’s Arbitration Policy unless they take affirmative action to opt-out in the manner and time-frame dictated by Respondent. It is undisputed that Respondent’s arbitration policy prohibits collective or class claims in both judicial and arbitral forums.” (GC Br. at p.6). The General Counsel therefore reasons that Respondent’s policy is “unlawful on its face” and violates Section 8(a)(1) of the Act.

Respondent asserts that the charge in the matter was untimely filed and therefore Charging Party is barred from pursuing the claim. Respondent also asserts that the Board’s decision in *D.R. Horton* was wrongly decided, that the Board lacks authority to interpret the Federal Arbitration Act, and nevertheless the rationale of *D.R. Horton* should not apply to the facts presented because it contends that its arbitration agreement is “voluntary.” Respondent further asserts that the remedies sought by the General counsel are improper. (R. Br. At 10).

A. *D.R. Horton* and *Murphy Oil* Are Controlling

Respondent, relying in part on the Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, 131, S.Ct. 1740, 1746 (2011), and *CompuCredit v. Greenwood*, 132 S.Ct. 665, 669 (2012), argues that *D.R. Horton* and *Murphy Oil* were both wrongly decided and should not be controlling in this matter. Respondent further argues that because the Fifth Circuit and other Circuit court’s have disagreed with the Board, the reasoning set forth in those cases should control. It must be noted that I am bound by *D.R. Horton* and *Murphy Oil* until either the Board or the Supreme Court overturns them.³ *Waco Inc.*, 273 LRB 746, 749 fn. 14 (1984) (it is the judge’s duty to apply established Board precedent which the Supreme Court has not reversed.” and “for the Board, not the judge, to determine whether precedent should be varied.”) (citation omitted); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enfd.* 640 F.2d 1017 (9th Cir. 1981); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). In view of this obligation, Respondent’s disagreement with the legitimacy of the Board’s holding in *D.R. Horton* and *Murphy Oil*, and its assertions that the Board’s actions were misguided, do not fit within the FAA savings clause, that there is no “Contrary Congressional Command” and/or that the Board exceeded its authority are more appropriately addressed to the Board itself.

³ It is important to note that *D.R. Horton* was not affected by the Supreme Court’s decision in *Noel Canning v. NLRB*, 134 S.Ct. 2550 (June 26, 2014), because *D.R. Horton* was not issued by the same Board members whose appointments were held to be invalid.

Nevertheless, Respondent asserts that even if *D. R. Horton* were properly decided it still would not compel a finding that its arbitration agreement interfered with Charging Party's Section 7 rights. I disagree.

5 B. The Charge Is Not Barred by the Statute of Limitations in Section 10 (b).

As will be discussed in more detail below, many of the issues raised herein by Respondent are the same or similar to those raised and addressed by administrative law judges in numerous other cases. This is a road that has been well traveled. Respondent's timeliness
10 argument is a familiar example. Respondent asserts that, "the conduct at issue occurred long ago and is clearly time barred." (R. Br. at 19). Respondent's theory is that since the arbitration agreement itself dates back to 2011 and the charge was not filed until May 6, 2014, it is well beyond the 6 months period contemplated by Section 10(b).⁴ This argument ignores well established Board precedent.

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The complaint alleged that Respondent maintained and enforced its arbitration agreement. (GC Ex. 1 (j), complaint paragraphs 4(a) and 6). Respondent in its answer openly admits to both the maintenance and enforcement of the agreement within 6 months of the filing of the charge. (GC Ex. 1(o), R. answer paras. 2 and 5). The Board has long held that Section 10(b) does not bar
20 an allegation of unlawful conduct that began more than 6 months before a charge was filed but has continued within the 6-month period since, "[t]he maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1)." *Register-Guard*, 351 NLRB 1110, 1110 fn. 2 (2007), enfd. in part 571 F.3d 53 (D.C. Cir. 2009), citing *Eagle-Picher Industries, Inc.*, 331 NLRB 169, 174 fn. 7 (2000). See also *Lafayette Park Hotel*, 326 NLRB 824,
25 825 (1998)." See also, *Control Services, Inc.*, 305 NLRB 435 fn. 2 (1991) (holding that Section 10(b) does not bar finding of violation of continually maintained rules), see also *Cellular Sales of Missouri, LLC* 362 NLRB. No. 27 (2015). In view of the above longstanding applicable Board precedent and Respondent's admissions that it both maintained and enforced the arbitration agreement, I find that the allegations are not time barred.

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C. Respondent's Violated Section 8(a)(1) by Maintaining and Enforcing its Arbitration Policy

The Board has long held that concerted legal action addressing wages, hours, and working conditions, whether, in a civil suit, before an administrative agency, or through
35 arbitration, all constitute concerted protected activities under Section 7 of the Act. *D.R. Horton*, *supra* slip op. at 2–3. In *Eastex Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978), the Supreme Court held that the 'mutual protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." In *Le Madri Restaurant*, 331 NLRB 269, 275(2000), the Board held that the filing of
40 civil suit by employees is protected activity.

⁴ Respondent relies on *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which arose in the context of Title VII. Respondent's reliance on *Ledbetter* is misplaced as the Court's analysis was openly rejected and superceded by passage of the Lilly Ledbetter Fair Pay Act of 2009 Pub. L. No. 1112, 123 Stat.5, which amended Title VII to define an unlawful employment practice to occur when an individual is affected by the application of a discriminatory practice. Simply put, *Ledbetter* is no longer good law and hasn't been since at least January 29, 2009.

There can be no dispute that the Act unambiguously gives employees the right to engage in protected concerted activities without interference from the employer. Respondent's policy on its face prohibits collective or class claims not only in judicial but also in arbitral forms and specifically and unambiguously precludes consolidation of claims, representative actions of any kind, and specifically precludes joinder.⁵ In a nutshell, the arbitration policy by its own terms seeks to deprive employees of the very right to engage in collective activity that Section 7 of the Act, the rule is unlawful and violates Section 8(a)(1). See *U-Haul of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir 2007). I therefore find the policy unlawfully restricts and interferes with the employees Section 7 rights to engage in concerted action for mutual aid or protection and on its face violates Section 8(a)(1).

Similarly, I find that since the agreement in question provides that "any, controversy, dispute or claim arising out of or relating to Employee's employment . . . shall be settled through binding arbitration," given the all inclusive nature of the language and without any clear exception for filing a charge with the Board, employees would reasonably conclude that they were precluded from filing an unfair labor practice with the Board.⁶ (GC1(j) Appendix A). Accordingly, a separate finding of a violation of Section 8(a)(1) predicated on the test and rationale set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), is also warranted. See also, *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Dish Network Corp.*, 358 NLRB No. 29, slip op. at 7–8 (2012); *University Medical Center*, 335 NLRB 1318, 1320–1322 (2001), enf. denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003).

I also find, as did the Board in *Murphy Oil*, that Respondent's efforts to enforce the arbitration agreement constituted a separate violation of 8(a)(1). In *Murphy Oil* the Board held that, "it is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights." See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962); *Republic Aviation Corp.*, 324 U.S. 793 (1945). That is precisely what the Respondent did through its motion to dismiss." The identical reasoning is applicable to Respondent's motion to dismiss in this case.

Respondent attempts to distinguish *D.R. Horton* from the instant matter arguing because its opt-out provision renders the agreement "voluntary" it does not violate the standards set forth by the Board in *D.R. Horton*. At the outset, I disagree with Respondent's characterization of the agreement as "voluntary" or "optional." Voluntary is defined in the *Webster's Third New International Dictionary* (1986) 2564, as "proceeding from the will or from one's own free choice or consent; unconstrained by interference . . . without legal obligation." The agreement doesn't meet even the most basic and understood definition of the term "voluntary." If the agreement was truly "voluntary," the employees would be afforded the opportunity (upon giving the employer reasonable notice), to change their minds (after they had a full and fair opportunity

⁵ Member Johnson in his dissent in *Murphy Oil* noted that a policy that didn't permit joinder in and of itself would constitute a violation of the Act. He specifically stated while referring to joinder that, "a prohibition on joint litigation imposed as a condition of employment prevents the exercise of this Section 7 right and does not serve any of the legitimate employer interests." I am in agreement that the prohibition of the joinder of claims in and of itself rises to the level of a separate violation of 8(a)(1).

⁶ It is important to note that even when the employees are on-boarded no attempt is made by Ms. Phoutrides to specifically advise them regarding whether or not their rights to proceed to the NLRB are affected by the arbitration agreement. (Tr. 14–18).

to develop some real knowledge of the working conditions), and notify the employer of their intention to no longer be covered by the agreement if they so desired. The employer's efforts to enforce the agreement make clear that this is simply not the case. If the employees do not affirmatively opt-out they are forever locked into the arbitration agreement regardless of any change in their choice or consent.

Moreover, as noted above, other Administrative Law Judges have addressed the identical issues raised in this case in so far as they relate to the question of whether the maintenance of an arbitration policy with an opt-out provision insulates Respondent from liability. In *24 Hour Fitness USA, Inc.* (Case 20–CA–035419, Nov. 6, 2012), *Securitas Security Services USA, Inc.*, 2013 WL 5984335 (NLRB Div. of Judges Nov. 8, 2013), *Dominos Pizza, LLC*, 2014 WL 1267122 (NLRB Div. of Judges, March 27, 2014), and *RPM Pizza*, 2014 WL 3401751 (NLRB Division of Judges, July 11, 2014), each found that an opt-out provision similar to that presented in this case violated Section 8(a)(1), and constituted an unlawful restriction of core rights granted to employees under Section 7. While these decisions are not binding precedent, I find the reasoning and rationale presented within each to be in line with the Board's rationale set forth in *Murphy Oil* and persuasive. In particular, I agree with my colleagues who have previously held that arbitration policies similar to that in this case were unlawful because the opt-out provision gives employees only a short time (30 days) to irrevocably consider (often times without representation) complex legal rights and consequences, many of which cannot be foreseen by a new employee, and it places upon employees the unreasonable burden of affirmatively making a decision to waive future rights protected under the Act. See *Ishikawa Gasket America, Inc.*, 337 NLRB 175–176 (2001); *Mandel Security Bureau, Inc.*, 202 NLRB 117 (1973).⁷

General Counsel supplements this list with its own assertions that:

- 1) The arbitration policy unreasonably imposes upon employees a waiver at a time when employees are unlikely to have notice of employment issues and/or where employees have no notice of their Section 7 right to engage in class or collective activity or that a prohibition on such activity violates Section 8(a)(1) of the Act;
- 2) Even if employees do opt out they are precluded from acting in concert with those who do;

⁷ I am mindful that other Administrative Law Judges have reached contrary results. See for example, *Bloomington's Inc.*, WL 3225945 (June 25, 2013), see also *Valley Health System LLC*, 28–CA–123611, 28–CA–127147 (March 18, 2015). The decisions appear to be contrary to the clear authority set forth by the Board in *Murphy Oil*. In particular, they run afoul of *Murphy Oil*'s holding that an arbitration agreement that prevents employees from exercising Section 7 rights, "amounts to a prospective waiver of a right guaranteed by the NLRA."

So too, I disagree with the notion in *Valley Health System LLC* that endorses a requirement that new employees shoulder the burden of paying for and seeking out counsel to preserve the very rights that are guaranteed under federal law. It is this very burden that interferes with the exercise of Section 7 rights.

⁸ One example of such interference comes when concerted activity takes the form of disparate impact cases. In *Griggs v. Duke Power*, 401 U.S. 24 (1971), the Supreme Court held that employment practices that are neutral on their face but have a discriminatory impact can violate Title VII. A plaintiff in such cases need not prove discriminatory intent but rather can establish

- 3) Requiring employees to preserve their Section 7 rights in an unlawful burdening of their Section 7 rights; and
- 5 4) The opt out procedure by its nature requires new employees to self identify at a time when they are particularly vulnerable as new employees and thus the agreement significantly burdens the right to engage in collective action.

10 I concur with General Counsel that all of the above considered individually and together offer valid and compelling rationale from which to conclude that the arbitration agreement unlawfully restricts core rights. General Counsel asserts and I agree that requiring employees to “self identify” burdens employee’s rights. This is especially true when as in this case the person notified of the decision is a high ranking company official. See *Special Touch Home Care Services*, 357 NLRB No. 2 (2011), holding that permitting an employer to compel employees to

through the use of statistics the discriminatory impact of the practice or policy. If a policy is neutral on its face and can only be discovered through the use of statistical analysis which requires some extensive investigation and/or discovery of the practices in question, it is highly unlikely that any new employee would meet the 30-day deadline to make an informed decision regarding whether to opt-out or not. Secondly, assuming the individual who discovered a neutral but discriminatory practice had opted-out, he/she may still be precluded from engaging in collective action and obtaining class wide relief to remedy class wide wrongs. In this hypothetical, although class wide discrimination might be present, other affected potential class members are presumably precluded from participating in the class thus defeating numerosity. This would clearly conflict with Section 7’s and Title VII’s purposes. The Supreme Court has held that, “race discrimination cases are by their very nature class suits involving class wide wrongs.” *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). It has even been noted that 23(b)(2) was specifically drafted to facilitate the vindication of civil rights through the class action device. See 5 *Moore’s Federal Practice Section 23.43[1][b]*, at 23–192(3rd Ed. 2005), see also, *Barefield v. Chevron*, 1899 WL 188433 (N.D. CA 1988). As the Supreme Court implicitly recognized in *Rodriguez* individual relief in many cases is simply inadequate to remedy class wrongs.

It should also be noted that the arbitration agreement, if enforced, would serve to dismantle the private attorney general scheme envisioned by Congress to encourage the effective public enforcement of statutes designed to remedy class wide or systemic wrongs in the employment setting. The fee shifting provisions of these statutes were specifically meant to bridge the gap between the desire of an individual who has been deprived a federal right to see that right vindicated and the financial ability to do so. As noted by Justice Brennan in *Newman v. Piggie Park Enterprises Inc.*, 390 U.S. 400, 401 (1968), by utilizing the private attorney general framework, “Congress sought to capitalize on the happy coincidence that encouraging private actions would, in the long run provide effective public enforcement.” As the Court also noted in *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 617 (1997), “the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry recoveries into something worth someone’s (usually an attorney’s) labor” (citations omitted).

provide individual notice of participation in collective action would impose a significant burden on the right.

In my view, the issue runs deeper than simply “self identification.” One of the two pillars of concerted activity is the recognition that there is strength in numbers and with this strength comes the balancing of power between employers and employees. Judge Dawson in *RPM Pizza*, 2014 WL 3401751 (NLRB Division of Judges, July 11, 2014), eloquently touched upon this when she noted that a similar opt-out provision, “creates a smokescreen and serves to restore the inequity” the Act intended to address. The second pillar of concerted activity revolves around the notion that that along with strength in numbers there is the perception of safety in numbers. Indeed, the Act specifically references the right to engage in concerted activities for “protection.” It is no doubt much easier for an employer to take an adverse action against a single “self identified” employee who complains about terms and conditions of employment or opposes an unlawful employment practice than it is to terminate a whole class of employees. Member Miscimara in *HTH, Pacific Beach Corp.*, 361 NLRB No. 65, 69 (2014), observed that, “the NLRA is unique among federal employment statutes. The core focus of the NLRA relates almost exclusively to the manner in which employees interact collectively and in support of one another.” He further observed that, “all of these protections have meaning only if employees have support from other employees....” *Id.*

The arbitration agreement by its very nature compels employees to act alone and strips them of the very support and “protection” that the Act intends to provide. It essentially deprives them of the core right to act in concert with others for “protection.” The chilling effect on the exercise of an employee’s rights by requiring that the employee act alone and without the “protection” of banding together with his or her fellow employees is unquantifiable and immeasurable but very real. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (wherein the Board held that the mere maintenance of work rule by employer will violate Act where the rule is likely to have a chilling effect), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). A perfect example arises repeatedly in cases of sexual harassment wherein a victim endures harassment because of fear.⁹ Oftentimes, these victims can find the courage to complain about the harassment only when others who have also been victimized are willing to stand with them to face the harasser. This is the very kind of support intended by the Act when it guaranteed employees the right to engage in concerted activities for “mutual aid or protection” and the very kind of support the arbitration agreement removes.

For the foregoing reasons, I find that Respondent’s maintenance of and requirement that employees enter into its arbitration agreement, as set forth above, as a condition of employment, unlawfully restricts core rights granted to employees under Section 7 of the Act and violates of Section 8(a)(1) as alleged in the complaint.

⁹ See for example, *Fresh & Easy Neighborhood Market Inc.*, 361 NLRB No. 12 (2014), which held that that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment allegation is acting for the purpose of mutual aid or protection.

CONCLUSIONS OF LAW

(1) The Respondent, Kenai Drilling Limited, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

(2) At all material times, the Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration policy that waives the rights of its employees to file and maintain class and collective actions in all forums, arbitral and judicial, and is applicable to all employees who fail to opt out of coverage under the arbitration policy during a one-time initial opt out period permitted to each employee.

(3) The above violations are unfair labor practices within the meaning of the Act.

(4) The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent's arbitration policy is unlawful, the Respondent shall be ordered to rescind or revise it to make clear to employees (in all of its facilities in which the arbitration policy has been implemented) that the policy does not constitute or require a waiver in all forums of their right to maintain or participate in collective and/or class actions, and shall notify employees of the rescinded or revised policy by providing them a copy of the revised policy or specific notification that the policy has been rescinded. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Respondent shall also notify any tribunal, arbitral or judicial where it has pursued the enforcement of the arbitration agreement that the underlying basis of its objection to the pursuit of any class or collective action was found to be violative of Section 8(a)(1) of the NLRA, and as such, the request to enforce or compel arbitration was void *ab initio*. It shall also notify the tribunal that in order to comply with federal law, Respondent desires to withdraw and/or vacate any such motion or request to compel arbitration and that Respondent no longer objects to the participation of its employees in such class or collective actions.

The General Counsel asks that Charging Party be reimbursed for any litigation expenses directly related to opposing Respondent's action to enforce its arbitration agreement. Respondent argues that the award of litigation expenses is improper. The Board in *Murphy Oil* directly considered the issue and stating, "consistent with the Board's usual practice in cases involving unlawful litigation, we shall order the Respondent to reimburse the plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion to dismiss their collective FLSA action and compel individual arbitration. See *Bill Johnson's*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to

reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses” and “any other proper relief that would effectuate the policies of the Act.”) In view of the Board having directly addressed the issue, and in reliance upon the Board’s decision, I find that the award of litigation expenses with interest is appropriate. The applicable rate of interest on the reimbursement shall be determined as outlined in *New Horizons*, 283 NLRB 1173 (1987) (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Kenai Drilling Limited, City, State, its officers, agents and representatives shall

1. Cease and desist from

(a) Maintaining, enforcing, seeking to enforce any arbitration agreement (the agreement) or policy that waives the right of employees to file and maintain class or collective actions in all forums, arbitral and judicial, and which applies irrevocably to those employees who fail to opt out.

(b) Requiring employees to sign binding arbitration agreements that prohibit collective and class litigation in all arbitral or judicial forums.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the agreement, in all forms and places, to make clear to employees that the agreement does not constitute or require a waiver in all arbitral or judicial forums of their right to maintain employment-related class or collective actions.

(b) Reimburse Charging Party, Eddie Stewart, III for all reasonable expenses and legal fees, with interest incurred in opposing Respondent’s unlawful motion to dismiss and compel arbitration.

(c) Notify employees of the rescinded or revised policy by providing them a copy of the new revised policy and/or specific written notification that the policy has been rescinded.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Notify any tribunal, arbitral or judicial where it has pursued the enforcement of the arbitration agreement that the underlying basis of its objection to the pursuit of any class or collective action was found to be violative of federal law, and as such, the request to enforce or compel arbitration was void *ab initio*. Notify the tribunal that in order to comply with federal law, Respondent desires to withdraw and/or vacate any such motion or request to compel arbitration and that Respondent no longer objects to the participation of its employees in such class or collective actions.

(e) Within 14 days after service by the Region, post at its facilities where the Agreement has been or is in effect, copies of the attached notice marked Appendix. Copies of this notice, on forms provided by the Region Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting or intranet or an internet site, and/or other electronic means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2011.¹¹

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 13, 2015

A handwritten signature in black ink, appearing to read "Dickie Montemayor", written over a horizontal line.

Dickie Montemayor
Administrative Law Judge

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a Union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain or enforce a binding arbitration agreement (the agreement) that waives the right of employees to maintain or engage in class or collective actions in all forums arbitral or judicial.

WE WILL NOT require employees to sign binding arbitration agreements that waive the right to maintain or engage in class or collective actions in all arbitral or judicial forums.

WE WILL NOT in any manner enforce and/or seek to enforce any arbitration agreement found to be in violation of the National Labor Relations Act by filing motions to dismiss and/or motions seeking to compel individual arbitrations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their rights guaranteed them by Section 7 of the Act.

WE WILL rescind or revise the agreement at all facilities where it has been implemented and is currently in effect and make it clear to employees that the agreement does not constitute a waiver of their right to maintain or engage in employment-related class or collective actions.

WE WILL notify our employees of the rescinded or revised agreement by providing to them a copy of the revised agreement or specific notification that it has been rescinded.

WE WILL reimburse Charging Party, Eddie Stewart, III for all reasonable expenses and legal fees, with interest incurred in opposing Respondent's unlawful motion to dismiss and compel arbitration.

WE WILL notify any tribunal where we have pursued the enforcement of our arbitration agreement that the underlying basis of our objection to the pursuit of any class or collective action was found to be violative of federal law, and as such, our request to enforce or compel arbitration was void *ab initio*. Further, we will advise the tribunal that in order to comply with federal law, we desire to withdraw and/or vacate any such motion or request to compel arbitration and that we no longer object to the participation of our employees in such class or collective actions.

KENAI DRILLING LIMITED

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824
(310) 235-7351, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at <http://www.nlrb.gov/case/31-CA-128266> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.